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Supreme Court of the United States

OCTOBER TERM, 1945.

No. 978.

LESLIE G. BOWEN, PETITIONER,

VS.

UNITED STATES OF AMERICA,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

REPLY BRIEF FOR THE PETITIONER.

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ARGUMENT.

The petitioner desires to make a few brief observations upon certain statements appearing in the respondent's brief.

The respondent states (Br. 6): "Petitioner concedes the propriety of the so-called 'Allen instruction' standing alone." This is inaccurate. The petitioner states (Pet. 17): "The petitioner is not *concerned* with the propriety of the foregoing instruction, nor modifications of it, standing alone, and *in a proper case.*" This is quite different from conceding the propriety of the instruction. In fact, petitioner cites a criticism of this instruction by the same court that rendered the decision below (Pet. 20).

The respondent endeavors to answer petitioner by stating that it is the "public" disclosure of the jury's numerical division which is condemned in the *Burton* and *Brasfield* cases (Br. 7 and 8). Petitioner submits that what this court condemns in those cases is the coercive effect of an instruction such as the one here, when the judge knows the numerical division of the jury and the jury knows that he knows. All proceedings in a court of law should be public. Is it contended, if a judge were privily to send an inquiry to a jury as to its numerical division and were to receive a written answer which he did not announce, and were then to give the supplementary instruction here given, that such behaviour would not be within the condemnation of the *Burton* and *Brasfield* cases? Respondent states (Br. 8) that it is "unrealistic to assume that the mere knowledge of the trial judge of the numerical division makes the otherwise appropriate 'Allen instruction' coercive." Petitioner makes no such contention. The petitioner contends that when the knowledge of the judge as to the numerical division is *known to the jury* and is made the subject of a *direct inquiry* as here, the instruction here given, always in a sense coercive, is reversible error.

Respondent further states (Br. 9):

> "Yet, it is well established that giving the 'Allen instruction' after the jury reports it is hopelessly

divided, deadlocked, or even that a majority favors one side, is not so coercive as to lay the foundation for reversal. *United States* v. *Olweiss*, 138 F. 2d 798, 800 (C. C. A. 2), certiorari denied, 321 U. S. 744; *Weathers* v. *United States*, 126 F. 2d 118, 119 (C. C. A. 5), certiorari denied, 316 U. S. 681; *Culp* v. *United States*, 131 F. 2d 93, 101 (C. C. A. 8); *Lucas* v. *United States*, 275 Fed. 405, 407 (C. C. A. 8), certiorari denied, 258 U. S. 620."

These cases are not authority for the proposition stated by respondent. In *United States* v. *Olweiss*, the jury reported it was "hopelessly divided." The Court did not give the Allen instruction but told the jury the case involved a simple question, to discuss the facts and that if there were any question of law he would be available to help them (138 F. 2d 800). In *Weathers* v. *United States*, the jury reported it was "hopelessly disagreed" (126 F. 2d 119). In *Culp* v. *United States*, the jury reported it was "unable to agree" (131 F. 2d 101). *Lucas* v. *United States* was decided in 1921, before the decision in the *Brasfield* case, which was decided in 1926. In none of the cases above, except the Lucas case, did the jury advise the court of its numerical division or did the judge verify any such report, or make any inquiry in that respect.

Respondent finally states (Br. 9) that it is unnecessary to speculate as to whether the giving of the instruction might be coercive for the reason that the jury had under consideration the guilt or innocence of three persons. Respondent infers from the fact that two were acquitted that the instruction therefore could not have been coercive and further states that the jury would have returned a verdict much more quickly than it did, had the instruction been coercive. After the instruction here was given, the jury was sent to bed for the night and deliberated about an hour in the morning before returning its verdicts. That is a very brief time for a jury's final

discussion, final vote and drawing up of verdicts. The fact that two of the defendants were acquitted might just as reasonably be said to indicate that the final verdicts were a compromise induced and coerced by the judge's charge, which fact in itself would be just as destructive of the rights of the petitioner, as had he been the sole defendant. Respondent is undertaking to speculate upon the effect of what this court said in the *Brasfield* case would "often depend upon circumstances which cannot properly be known to the trial judge or to the appellate courts" (272 U. S. 450, 71 L. Ed. 346).

CONCLUSION.

It is respectfully submitted that the petition should be granted.

Respectfully submitted,

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